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No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART; CITY ENGINEER GERALD DZURILLA, AND CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION; CUYAHOGA HOUSING PARTNERS, INC.; BUCKEYE COMMUNITY THREE L.P.; AND FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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14 pp

TABLE OF CONTENTS

Table of Authorities ii

Reply Brief in Support of Petition 1

A. Equal Protection and Fair Housing Act 4

1. Intentional Discrimination Claim 4

2. Disparate Impact Claim 5

B. Due Process 6

C. *Res Judicata* 8

D. First Amendment Rights 8

Conclusion 9

TABLE OF AUTHORITIES

CASES

Allen v. McCurry,
449 U.S. 90, (1980) 8

Arthur v. Toledo,
782 F.2d 565 (6th Cir. 1986) 4, 5, 6, 9

Bannum v. City of Louisville,
958 F.2d 1354 (6th Cir. 1992) 6, 7

Board of Regents v. Roth,
408 U.S. 564 (1972) 6, 8

Clarke v. City of Cincinnati,
40 F.3d 807 (6th Cir. 1994) 5, 6

Eastlake v. Forest City Enterprises, Inc.,
426 U.S. 668 (1976) 5

Grava v. Parkman Township,
73 Ohio St. 3d 379 (1995) 8

James v. Valtierra, 402 U.S. 137 (1971) 4, 5

Jamestown Village Condo. Owners Assoc. v. Market Media Research,
96 Ohio App. 3d 678 (1994) 8

Metropolitan Housing Development Corp. v. Village of Arlington Heights,
558 F.2d 1283, (7th Cir 1977) 4

Meyer v. Grant, 486 U.S. 414 (1988) 9

Migra v. Warren City School Dist. Bd. of Education,
465 U.S. 75 (1984) 8

Nasierowski Brothers Investment Co. v. Sterling Heights,
949 F.2d 890 (6th Cir., 1991) 7

Pearson v. Grand Blanc,
961 F.2d 1211 (6th Cir. 1992) 6, 8

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 4

Williamson Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 7, 8

STATUTES, CHARTER AND CONSTITUTIONAL PROVISIONS AND TREATISES

28 U.S.C. 1738 . . . . . 8, 10

Ohio Constitution, Article II, Section 1c 3

O.R.C. 731.29 3

Restatement of Judgments 2d, Section 33 8

REPLY BRIEF IN SUPPORT OF PETITION

In an attempt to minimize the constitutional importance of this case, Respondents ("Buckeye") claim that the City is simply arguing facts. Such is not the case as the errors of the Court of Appeals are not errors of fact, but rather of constitutional law. In the decision below, a federal court of appeals has held for the first time that a city can be held subject to equal protection liability even though:

1. The government decision-maker is not motivated by racial bias, and

2. The decision-maker's action is required of him by the filing of a referendum petition that is:

   a. Facially neutral,

   b. Supported by justifications other than racial bias, and

   c. Judicially upheld by every level of the state judicial system.

Likewise, for the first time, a court of appeals has held that a facially neutral, judicially upheld, referendum petition can form the basis of a disparate impact claim under the Fair Housing Act.

These are not factual decisions rendered by the court below. Indeed, as properly pointed out by Buckeye, this case was decided on motions for summary judgment precisely because the material facts are not in dispute. Buckeye now attempts to raise factual issues by misstating or manufacturing facts that simply do not exist. Such a tactic should not be permitted to distract this Court from the serious constitutional issues presented here.

The material facts, about which the courts below found no dispute, are as follows:

1. Buckeye purchased property in Cuyahoga Falls and, thereafter, applied to the City for a site plan approval to construct an affordable housing project. (App. 3a) At public hearings, some members of the public expressed opposition in arguably racial terms (App. 15a) Others, however, raised issues that did not involve racial bias. (App. 18a-19a, 47a) The City's Planning Commission and City Council rejected all expressed opposition to the project and approved the site plan. (App. 4a-5a) Mayor Robart also "pocket approved" the project by neither signing nor vetoing the site plan ordinance. (App. 93a) Contrary to Buckeye's new and imaginative assertion at page 2 of its brief, the Mayor's failure to sign the ordinance had no impact on the timing of the effectiveness of the ordinance or the City's ability to issue building permits. (See Judge Bell's analysis concerning the effectiveness of the ordinance at App. 93a-95a)

2. The site plan approval was subject to several conditions that were agreeable to Buckeye. (App. 61a) One of the conditions was that, before building permits could be issued for the apartment complex, Buckeye would build a fence along its property line. (App. 61a, 37a, 42a-43a)

3. The ordinance was scheduled to take effect on May 2, 1996. (App. 94a) After Council passed the site plan ordinance on April 1, 1996, but before it was scheduled to take effect, Buckeye filed an application with the City Engineer for building permits for its project. (App. 37a) However, Buckeye did not build the fence that was a prerequisite to the issuance of building permits. (*Id.*) Thus, building permits were withheld until such time as the site plan ordinance took effect and Buckeye built the required fence.

4. On April 29, 1996, before the ordinance could take effect, residents of the City filed a referendum petition, which stayed the effectiveness of the ordinance pursuant to the City's charter. (App. 94a-95a) Contrary to Buckeye's claim at page 10, footnote 2 of its brief, the City Charter provision, which stayed the effectiveness of the site plan ordinance, is fully consistent with and, in fact, modeled after Ohio constitutional and statutory law. (App. 94a, n. 19; Ohio Constitution, Article II, Section 1c; O.R.C. 731.29)

5. "It is undisputed that the referendum in this case was facially neutral and that there were other hypothetical justifications for the referendum apart from racial bias." (Court of Appeals opinion at App. 18a-19a)

6. The City Engineer sought legal advice from the City's Law Director who advised that, due to the filing of the referendum, building permits could not be issued until the efficacy of the ordinance was determined. (App. 44a) The Engineer withheld permits based on this advice. (*Id.*) Mayor Robart, despite his personal opposition to the project, had no role in the decision to withhold building permits. (App. 49a-50a) Thus, any opposition to the project expressed by him was ineffective and, therefore, irrelevant. (*Id.*)

7. Until July 16, 1998, when the Ohio Supreme Court issued its final judgment, all three levels of Ohio courts upheld the validity of the referendum petition. (App. 255a, 246a, 214a)

8. There is no evidence that the City Engineer, in withholding permits, was motivated by racial animus. (App. 48a)

A. Equal Protection and Fair Housing Act

1. Intentional Discrimination Claim

The case of *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) permits an equal protection cause of action where *government decision-makers* are motivated by an intent to racially discriminate. In Cuyahoga Falls, the decision to issue or withhold building permits rests with the City Engineer. Judge Polster properly inquired into the Engineer's motivation and found no evidence of discriminatory intent on his part. (App. p., 48a.) Buckeye could likewise present no evidence of such discriminatory intent. Thus, it argued, as it does now, that the Court should have examined the political expressions of a handful of citizens to find a racial motivation it could then impute to the City Engineer.

Buckeye justifies such an analysis as being part of the "sensitive inquiry" into intent required by *Arlington Heights*. However, Buckeye fails to distinguish between the intent of the *decision-maker* who withheld building permits and the motivations of a myriad of diverse citizens who merely signed a referendum petition. *Arlington Heights* permits examination of the former, but not the latter. See also *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986).

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court recognized that the valid and proper actions of the people must be honored despite the possibility that those actions may be supported by persons whose political views are less than appealing. For this reason, the court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, (7th Cir 1977) (*Arlington II*), warned at page 1292 that, "the bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a

legitimate basis." The Court below specifically found that the instant referendum had a legitimate basis, being justified by concerns other than racial bias. (App. 19a) Yet, it held that the City could be held liable for the arguably racial comments of a literal handful of individuals. (App. 15a) Such a holding will negate *any* referendum on public housing, for "proponents of the project could always introduce race as an issue in the referendum election" thereby subjecting the election to an equal protection challenge. *Arthur v. Toledo*, *supra*, at 574.

For this reason, and after fully analyzing this Court's prior decisions concerning referenda, the *Arthur* court concluded at 782 F.2d 565, that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context."

The *Arthur* holding is sound and must be adopted by this Court in order to prevent the aberration of the decision below. The Court below justified its holding by stating it was not overturning the *result* of the referendum. While this is true, it did something far worse; it overturned the referendum *process* itself, by permitting liability for the mere *filing* of a referendum petition. This holding is contrary to the sentiments expressed in *James*. See also *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

2. Disparate Impact Claim

Buckeye's response concerning its disparate impact claim is less than helpful. It criticizes the City for relying only upon cases from the Sixth Circuit. *Arthur*, *supra*; *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994). However, Buckeye has cited *no* case in which the filing of a referendum

petition was found to support a disparate impact claim. The City has likewise been unable to find one. The earlier decisions of the Sixth Circuit in *Arthur* and *Clarke* are well reasoned with ample support for the rejection of such a cause of action. As this Court has never ruled on this issue, it is fitting that it do so now.

B. Due Process

In an attempt to bolster its due process argument, Buckeye states at page 1 of its brief that the "Developers complied with all site plan and zoning requirements, as well as with additional requirements imposed on them by the City." This statement is patently false.

As noted above, the site plan approval required Buckeye to construct a fence along its property line before receiving building permits for the apartments. (App. 37a, 42a-43a.) It did not do so, which in itself provided a rational basis for the withholding of building permits. (App. 42a)

Buckeye claims at pages 8 and 9 of its brief that the City's approval of the site plan gave it a legitimate expectation to building permits. However, the approval of the site plan was but one of many prerequisites to the issuance of building permits. *All* lawful requirements had to be fulfilled before Buckeye could claim a "legitimate expectation" to permits. See *Board of Regents v. Roth*, 408 U.S. 564. Furthermore, as long as Buckeye failed to comply with these requirements, the decision to withhold building permits cannot be said to have been "arbitrary and capricious." *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

The Court of Appeals, relying upon *Bannum v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), erroneously excused Buckeye from the requirement to build the fence stating it would have been a "futile act" in light of the

referendum. (App. 28a, n 5) However, *Bannum* was an equal protection case, not a due process case, and dealt with the doctrine of finality. That doctrine remains intact in the due process context. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

Buckeye complains that the referendum petition violated the Ohio Constitution. However, as properly found by Judge Polster, that was not decided for several years after Buckeye first applied for building permits. During the intervening time, the Ohio courts, including its Supreme Court, upheld the constitutionality of the referendum petition. Thus, "there was no time (until the Supreme Court reversed itself in July 1998) during which the City had any legal authority to issue a permit to the Developers." (App. 42a.) It cannot be a due process violation for the City to withhold what it has no authority to give.

Buckeye's reliance upon *Nasierowski Brothers Investment Co. v. Sterling Heights*, 949 F.2d 890 (6th Cir., 1991) is misplaced. In that case, the developer purchased property in reliance upon the city's specific representation that the proposed use was lawful. In the instant case, Buckeye took no detrimental action in reliance upon any representation of entitlement to building permits. Unlike the developer in *Nasierowski*, Buckeye purchased its property on June 12, 1995, long before applying for building permits in April, 1996. (App. 3a) Buckeye can, therefore, claim no detrimental reliance upon any expectation of entitlement to permits.

Because Buckeye had no legitimately held property interest in the receipt of building permits and because the City's withholding of such permits had several rational bases in law, it was an error of law for the Court of Appeals to allow Buckeye to maintain its due process challenge. *Board*

of Regents v. Roth, *supra*; *Williamson Planning Comm'n v. Hamilton Bank*, *supra*; *Pearson v. Grand Blanc*, *supra*.

C. *Res Judicata*

Buckeye's single-paragraph argument on *res judicata* misses the point. The error of Judge Bell and the Court of Appeals is not that they misinterpreted Ohio law; rather, they improperly *created* Ohio law contrary to *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984).

Ohio does not permit successive actions arising out of a single factual transaction. *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995). An exception to this rule is where the first lawsuit sought nothing more than a declaratory judgment. *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, 96 Ohio App. 3d 678 (1994); Restatement of Judgments 2d, Section 33. Such is not the case here where Buckeye's initial state action sought declaratory *and* injunctive relief. By extending the *Jamestown* exception to this case, Judge Bell and the Court of Appeals improperly created new law for the State of Ohio, thereby violating 28 U.S.C. 1738 and *Migra*, *supra*. See also *Allen v. McCurry*, 449 U.S. 90, (1980).

D. First Amendment Rights

Buckeye claims that its position does not jeopardize the rights to assemble, speak freely, and petition the government. In fact, Buckeye claims to recognize that people have the right to express themselves, but then goes on to state that such expression can be the basis of civil rights liability. Buckeye brief, pp. 12-13. In the referendum context, however, such cannot be allowed because of the heterogeneous nature of popular elections.

Certainly, the courts can look to the comments of a government decision-maker to determine that person's motives. *Arlington Heights*, *supra*. However, in the referendum context, the people do not speak with one voice, nor do they act with one motive. In this case, over 4,300 people signed a facially neutral petition that the Court of Appeals recognized was supported by justifications other than racial bias. Thus, the political action of those 4,300 people is constitutionally protected under any theory. *Meyer v. Grant*, 486 U.S. 414 (1988). Yet, Buckeye would invalidate this lawful activity and hold the City financially liable because of the arguably racial comments of a handful of individuals. Thus, Buckeye wholly subscribes to the warning of *Arthur* at 782 F.2d 574 that liability can be found if only one citizen testifies that racial considerations motivated him to sign the petition. Buckeye's position indeed jeopardizes the first amendment rights of the people as it subjects the legitimate actions of the people and their government to liability for the radical views expressed by one person.

CONCLUSION

While this Court has decided many referendum cases, it has never held on the issues currently before it, specifically, whether a district court may inquire into the motivations of referendum petitioners to find a basis for intentional discrimination on the part of government decision-makers. It has also never before decided whether a facially neutral referendum petition can form the basis of a disparate impact claim under the Fair Housing Act.

Also unique to this case is the question whether a City can be held liable for civil rights violations when its acts are in complete obedience to valid court decisions. Of course, those prior court decisions also raise the federal question of whether

the federal courts must give them full faith and credit under 28 U.S.C. 1738.

Despite Buckeye's protestations to the contrary, this case presents many issues requiring this Court's studied attention. For the reasons expressed herein, along with those presented in its original petition, the City respectfully requests this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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